IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 527

EUGENE T. SINGER,

Petitioner,

against

THE YOKOHAMA SPECIE BANK, LIMITED,

Defendant,

and

ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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January 4, 1950.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Eugene T. Singer, respectfully prays for a writ of certiorari to the Court of Appeals of the State of New York to review the judgment of that Court dated April 14, 1949 (R. 530-40)*, as amended by the Order of

*References in parentheses are to pages of the Record on Appeal. Figures in brackets indicate page in the Record on Appeal where receipt of a document in evidence is shown.

said Court dated July 19, 1949 (R. 541-2), and the judgment entered thereon in the Supreme Court of the State of New York, in the County of New York, on November 25, 1949 (R. 588-91), in so far as said order and judgments direct that your petitioner's claim against said respondent shall not be paid until a license for such payment shall have been issued by the Secretary of the Treasury of the United States (R. 541-2, 589-90) and refuse to grant and disallow interest upon your petitioner's claim (R. 541-2, 589-90). A certified transcript of the record in this case has been filed with the Clerk of this Court by the Superintendent of Banks of the State of New York in connection with his petition for certiorari, No. 512.

PRELIMINARY STATEMENT

This case presents questions relating to the application of federal wartime foreign funds control, inaugurated and administered pursuant to the provisions of the Trading with the Enemy Act, as amended, and Executive Order No. 8389 and subsequent orders, rulings and regulations—*first*, to the attempt of plaintiff-petitioner's assignor, Standard Vacuum Oil Company, prior to the outbreak of war, to remit $557,561.25 from itself at Yokohama, Japan, to itself at New York, through the Yokohama Specie Bank (which question is presented by the application of the Superintendent of Banks of the State of New York for certiorari); and, *second*, to the right of your petitioner, as such assignee, to receive payment of his claim for said $557,561.25 from the defendant, Superintendent, as statutory liquidator of the business and property in New York of said The Yokohama Specie Bank, Ltd., without first obtaining a specific Treasury license authorizing payment

of such claim; and *third*, to the right of your petitioner to receive interest upon such claim.

The Court of Appeals decided the second and third questions adversely to your petitioner. Under its decision, the question whether your petitioner is entitled to interest depends solely upon the question whether payment of the claim has been licensed by the United States Treasury.

The decision of the Court of Appeals, in so far as adverse to your petitioner, turns upon two questions of federal law: *first*, whether the prohibitions of Executive Order No. 8389 or the requirement thereunder for a Treasury license continued to apply to the payment of claims by the Superintendent as such statutory liquidator after the Alien Property Custodian assumed jurisdiction over such liquidation; and *second*, if so, whether certain documents issued to the Superintendent as such liquidator by the Treasury and by the Alien Property Custodian, which were received in evidence, and in particular, the Treasury's license to the Superintendent dated January 14, 1942 (R. 375-7 [227-8]), the Treasury's letter to the Superintendent dated October 29, 1942 (R. 380 [228-9]), the Alien Property Custodian's letter to the Superintendent dated September 28, 1942 (R. 378-9 [228]) and the Alien Property Custodian's Vesting Order No. 915, dated February 15, 1943 (R. 485-8 [333]) authorize the payment of all claims against said Yokohama Specie Bank which were admitted or established (as your petitioner's claim has been) pursuant to the provisions of section 606, par. 4, of the New York Banking Law, governing the liquidation of the New York business and assets of foreign banks having agencies or branches in New York.

The New York Court of Appeals, affirming a prior decision in the case upon that point (*Singer* v. *The Yoko-*

hama Specie Bank, Ltd., 293 N. Y. 542; R. 525-529) has held that Executive Order No. 8389 and associated regulations and orders did not prevent the accrual, in favor of your petitioner's assignor (Standard-Vacuum Oil Company), of a claim against the Superintendent of Banks, as liquidator, under the provisions of Section 606, subd. 4 of the New York Banking Law (as it stood prior to its amendment in 1946)* and accordingly affirmed the decision of the courts below, sustaining the validity of your petitioner's claim against the Superintendent of Banks as such liquidator under the New York law (299 N. Y. 113, 119). The Superintendent has petitioned this Court for certiorari, to review said determination and judgments against him.

The Court of Appeals further ruled, however, that the provisions of Executive Order No. 8389 and orders, rulings and regulations issued thereunder prevent the payment of your petitioner's claim or of said judgments entered thereon unless such payment is specifically licensed by the United States Treasury, and that none of the documents in evidence constitutes such a license (299 N. Y. 113, 125). It accordingly reversed the judgments and decisions of the courts below, which had ruled unanimously that payment of said claim and judgments may be made without such license, and also, and solely upon the stated ground that such Treasury license is necessary and that none has been issued (299 N. Y. 113, 125, 126), struck from said judgments and disallowed interest in the sum of $146,279.62, which also had been unanimously awarded to your petitioner by the lower courts. Your petitioner assigns those two rulings by the Court of

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*New York L. 1946, c. 65; all subsequent references in this petition and brief to section 606, subd. 4, will be to such statute as it stood prior to its amendment in 1946. The 1946 amendment expressly provides that it shall not be applied retroactively.

Appeals as error. Your petitioner respectfully prays for a writ of certiorari to the New York Court of Appeals, to review the correctness of those two rulings.

How the Questions were Raised in the State Courts.

At the close of the trial, plaintiff (petitioner) submitted to the New York Supreme Court and that Court signed findings that the Treasury, on January 14, 1942, licensed the Superintendent to liquidate the Bank's business and property in New York in accordance with the law of New York and on October 29, 1942, by letter, authorized him to engage in any transaction which might be engaged in without a license by a person not a national of a blocked country, and that the Alien Property Custodian, by letter, on September 28, 1942, authorized him to continue to retain possession of such business and property and to perform such acts in connection therewith as were required or permitted by the State Banking Law (R. 47). The trial court also determined at plaintiff's request that plaintiff was entitled to interest (R. 48), and adjudged that plaintiff is entitled to payment of the principal amount adjudged due (R. 91). Production of a Treasury or other license to permit payment was not directed.

The two questions of law which petitioner requests this Court to review were not directly or explicitly raised at trial term of the State Supreme Court. He was not required to and could not raise them (except to the extent noted above) because under New York law: "all grounds of defense * * * which * * * would raise issues of fact not arising out of the preceding pleadings, as * * * illegality, either by statute, common law" and the like must be alleged affirmatively by the defendant (New York Civil Practice Act, § 242), and

because the burden of raising such issues at trial term also rests upon him (e. g., *Rapee* v. *Beacon Hotel Corp.*, 293 N. Y. 196, 199; compare *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U. S. 801; 808). The Superintendent did allege and attempt (unsuccessfully) to establish at trial term that lack of a Treasury license for the underlying banking transactions prevented the accrual of the claim but did not plead or attempt to prove that he, as liquidator, could not pay such a claim (if adjudged to be valid) in his capacity as liquidator, without a license.

The contention that the plaintiff's (petitioner's) claim, or the judgment thereon, could not be paid by the Superintendent without a license, was first raised by the Superintendent in his briefs to the Appellate Division of the New York Supreme Court, where it was also raised in briefs filed by the United States as *amicus curiae*. The plaintiff, in his briefs in answer, contended to the contrary, arguing that the federal documents in suit (which are referred to in the findings noted) constitute licenses authorizing payment by the Superintendent, and that a dual control over claims, by the Treasurer and by the Custodian, was not intended. The Appellate Division affirmed the judgment, findings and conclusions rendered below without modification of any sort, and without opinion.

In the Court of Appeals the Superintendent and the United States, as *amicus curiae*, renewed their contentions respecting the need for a license to permit payment, and the plaintiff renewed his argument to the contrary. The State Reporter, summarizing plaintiff's brief to that Court, noted his arguments (p. 116) that:

> "* * * IV. Payment of the claim and judgment has been authorized by the Federal authorities. The

Treasury authorized payment on January 14, 1942, and on October 29, 1942. V. A Treasury license was not necessary after the Alien Property Custodian assumed jurisdiction over the State liquidation proceeding. VI. The Alien Property Custodian has specifically authorized the Superintendent to pay the claims of all creditors of the bank preferred under the New York Banking Law. * * *".

Statement of Facts

Standard-Vacuum Oil Company, a Delaware corporation (R. 35), your petitioner's assignor (R. 43), in February and March, 1941, at Yokohama, Japan, entered into four forward foreign exchange contracts with The Yokohama Specie Bank, Ltd., under which Standard agreed to pay to the Bank, at Yokohama, the yen equivalent, at the rates of exchange then existing, of $557,561.25, and the Bank agreed to pay (or, as stated by the contracts, to deliver) that sum in dollars to Standard in New York, during July and August of that year (R. 399-405 [502-3]).* Said sum represented the anticipated proceeds of sale of four cargoes of crude oil, machine oil, kerosene and low grade gasoline; three of which were to be shipped from the Orient and the fourth from the Orient, Europe, or the United States (R. 382-398 [502-3]).** All the foregoing

*Said contracts state that Standard had "bought" and the Bank has "sold" stated sums in dollars "for delivery" in July and August (R. 399-405).

**At that time, national policy favored such trade. Thus, on July 24 1941 (reported, New York Times, July 25, 1941), President Roosevelt, in an interview with the press, stated: "Now, if we cut the oil off, they (the Japanese) probably would have gone down to the Dutch East Indies a year ago and you would have had war. Therefore, there was—you might call—

transactions took place long prior to the President's declaration of an unlimited national emergency on May 27, 1941, and to the effective date (June 14, 1941) and the actual date of issuance (July 26, 1941) of Executive Order No. 8832, extending the provisions of Executive Order No. 8389 and foreign funds control to Japan and the Orient.

The performance of these forward foreign exchange contracts was somewhat delayed by the Japanese Government, which suspended but later reinstated the Japanese licenses under which they were to be carried out (R. 131-133). However, on August 29, 1941, Standard having paid the agreed consideration in yen to the Yokohama Specie Bank,* the Bank, by cable, confirmed by letter, directed its New York Agency to pay said $557,561.25 to Standard in New York (R. 36, 503).

Meanwhile, on July 26th, when Executive Order No. 8389 was extended to Japan, a United States Treasury Supervisor and a corps of 13 or 14 assistants were placed in charge of the New York Agency of the Yokohama Bank (R. 279-285). When the cable message to make the payment to Standard was received from the Bank's Yokohama office, representatives of the New York Agency, acting under the general authority of the Treasury Supervisor (R. 259, 260, 287), by telephone and letter advised Stand

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a method in letting this oil go to Japan, with the hope—and it has worked for two years—of keeping war out of the South Pacific for our own good, for the good of the defense of Great Britain and the freedom of the seas."

*Following the trial, copies and translations of the records of the Yokohama office of the Yokohama Specie Bank, including copies of the forward foreign exchange contracts, were received by the Superintendent of Banks through the War Department. They have been placed in the record by stipulation, and fully bear out the foregoing statement of facts (R. 382-405, 502-3).

ard at its head office in New York, that such instructions had been received, and it was agreed that Standard would file application with the Treasury for a license to permit the payment to be made (R. 36, 358 [118-9]). The New York Court of Appeals has now held, in two unanimous decisions, that those transactions by Standard and the Bank's New York Agency entitle plaintiff to recover from the Superintendent, as liquidator of the Bank's business and property in New York, under the provisions of section 606(4) of the New York Banking Law, $557,561.25 (being the principal amount of his claim, without interest) upon production of a Treasury license, and that such sum constitutes a preferred claim against the Superintendent as such liquidator under the Banking Law.*

Standard made two applications to the Treasury for a license for payment of said $557,561.25, on August 29th, and again on December 29, 1941 (R. 412-423 [155]). The Japanese attacked Pearl Harbor on December 7, 1941, and on December 8 war was declared. On January 12th and 14th, 1942, the Treasury denied the applications (R. 425-426 [156]).

Immediately following the outbreak of war the Superintendent of Banks, acting under provisions of section 606, subd. 4, of the New York Banking Law, took over the business and property in New York (including said New York Agency) of the Yokohama Specie Bank, with the object of liquidation and the payment of those creditors entitled thereunder to payment out of the Bank's New York assets. He acted in cooperation with the federal authorities, pursuant to a series of licenses and authorizations, issued at first by the Treasury and later by the Alien Property Custodian.

*See 290 N. Y. 701; R. 54.

As stated above, your petitioner relies upon those documents as authorizations for the payment of his claim, as a creditor of the Yokohama Specie Bank whose claim arose out of a transaction with its New York Agency within the contemplation of the State Banking Law. Those documents are as follows:

The first document is a license issued by the Treasury to the Superintendent on December 19, 1941 (R. 479 [333]). It authorized the Superintendent to make payments from the blocked accounts at domestic banks standing in the name of the New York agencies of Japanese and Italian banks "for the purpose of office maintenance and other expenses incidental to the administration of the property of such agencies, in anticipation of liquidation". Obviously preliminary in character, it was followed, on January 14, 1942 (R. 375-7), by a general liquidation license (which was cancelled on October 29, 1942 (R. 380), but which bears upon your petitioner's right to interest) authorizing the Superintendent to pay "depositors", sell securities, deliver collateral, pay salaries and other expenses, and perform all other acts appropriate to the orderly liquidation of the assets, property and business in New York, in accordance with the laws of New York, of ten named Japanese and Italian banks, one of the banks so named being "Yokohama Specie Bank, Limited". The license required the Superintendent (1) to pay into blocked accounts in domestic banks all moneys due to enemy nations or nationals; (2) to obtain special licenses for all transactions involving blocked nationals other than "the bank in liquidation"; and (3) not to make payment to the banks' stockholders without a special license.

In determining the meaning and purpose of this license of January 14, 1942, the following facts must be noted.

First, in New York, foreign banks, their agencies and branches are not permitted to act as banks of deposit or to engage in a general banking business, but are allowed to engage only in the foreign credit, remittance and exchange phases of banking, and the licenses issued to the Bank by the Superintendent and his predecessors expressly restrict it to such business (R. 477-8 [332]). Second, this license does not refer to the New York agencies of any of the ten banks. On the contrary, the license (following the provisions of the Banking Law in that respect) speaks of the liquidation of the business and property in New York of the ten foreign banks by name; in this case, of "Yokohama Specie Bank, Limited". There is no authority under New York law for treating the Yokohama Bank and its New York Agency as separate banks (*Matter of Goebel*, 295 N. Y. 73) or for regarding the bank and the agency as having separate creditors* or property, or for limiting the Superintendent's powers as liquidator to such business or property of the foreign bank as may be possessed or maintained by, or may be said to belong to, the Agency. Indeed, in a supplementary license issued to the Superintendent on February 9, 1942, the Treasury empowered him to authorize all banking institutions in New York to transfer to him any funds standing in the name of, or held for, or belonging to the head office or any branch or agency of said ten banks, including the Yokohama Specie Bank, (R. 480-481 [333]).

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*The liquidation statute (section 606(4) as it stood prior to its amendment in 1946) speaks of "*creditors of such corporation* arising out of transactions * * * with its New York agency * * *," or whose names appear upon the agency's books. Such claims are preferred against assets in the possession of the Superintendent as liquidator.

The Superintendent of Banks continued to operate under the Treasury license of January 14, 1942, until September or October of that year. On September 18, 1942, the Alien Property Custodian, by Supervisory Order No. 27, assumed supervision over the liquidation proceeding (R. 482-4 [333]), and by letter dated September 28, 1942, advised the Superintendent that it was contemplated that he (the Superintendent) "continue to retain possession of and liquidate such business enterprise, * * * its property and assets, and in the course thereof you may do such acts and perform such duties as may be required of or permitted to you by" the New York Banking Law, but directed him to notify the Custodian, in advance, of all claims which he intended to accept (R. 378-9). On October 29, 1942, the Treasury advised the Superintendent that, in view of the Custodian's issuance of the Supervisory Order, he might thereafter, so far as Executive Order No. 8389 was concerned, "engage in any transaction * * * which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country," revoked its license of January 14, 1942, and suggested that the Superintendent consult the Custodian "concerning the applicability to your enterprise of any orders, rulings or regulations of said office (R. 380). This action was taken by the Custodian and the Treasury pursuant to Executive Order No. 9193. Paragraph 2 of that Order provides:

> "When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of

such property, except as authorized or directed by the Alien Property Custodian."

It is your petitioner's contention that after the issuance of the Custodian's Supervisory Order No. 27 and the Treasury's renunciatory letter of October 29, 1942, all authority by the Treasury, and consequently, any requirement for a Treasury license, was terminated.*

On February 15, 1943, the Alien Property Custodian issued Vesting Order No. 915. By that Order he administratively determined that: "The excess proceeds of the business and property in the State of New York of the Yokohama Specie Bank, Ltd., in the possession of the Superintendent of Banks * * * remaining after the payment of the claims of the creditors, accepted or established in accordance with the Banking Law of the State of New York, arising out of transactions had by them with the New York agencies of said The Yokohama Specie Bank, Ltd., or whose names appear as creditors on the books of such agency, together with interest on such claims and the expenses of liquidation"** is property owned or controlled by, and payable to a Japanese national, and those excess proceeds he vested. The Order expressly authorizes the Superintendent of Banks:

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*It was contended on behalf of the Superintendent in the Court of Appeals (for the first time) and is intimated by that Court's opinion that perhaps a license for payment from the Custodian, or from the Attorney General as his successor, may now be necessary. However, the Court expressly refused to rule upon the question (299 N. Y., at p. 125); see supra, at page 5 et seq. (Statement under Rule 12).

**This quoted language paraphrases the language of section 606, subd. 4 of the New York Banking Law as it stood before the 1946 amendment.

> "* * * to continue to retain possession of, collect and liquidate such business, property and assets and in the course thereof, to do such acts and perform such duties (not inconsistent herewith) as may be required or permitted to said Superintendent of Banks by and in accordance with and subject to the provisions of the Banking Law of the State of New York; * * *"

and directs the Superintendent to pay to the Custodian the balance remaining after such liquidation is concluded (R. 485-8).

One of the "acts * * * and * * * duties required [of] * * * said Superintendent of Banks by * * * the Banking Law of the State of New York" is to pay the "claims of creditors of such corporation [The Yokohama Specie Bank, Ltd.]* arising out of transactions had by them with its New York agency or agencies; * * *" (Section 606(4)). Thus the payment of your petitioner's claim, as a claim whose source, character and validity is "established in accordance with the Banking Law" of New York by the judgment of its courts, is within the express terms of the authorizing clause of the Vesting Order. No language in the Order restricts in any manner the claims which the Super-

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*The claim is required to be against the foreign bank, and the plaintiff must be a creditor of that bank. Thus in *Banque Mellie Iran* v. *The Yokohama Specie Bank*, 299 N. Y. 139, the Court of Appeals said, at page 144:

> "* * * These dealings constituted, to use the language of our decision in the earlier *Singer* appeal (293 N. Y., *supra*, at p. 55), 'a transaction had by a creditor', plaintiff Banque Mellie, 'of a foreign corporation', Yokohama Specie Bank, Ltd., ' "with its New York agency," ' and, *pro tanto*, entitled plaintiff to a preference under subdivision 4 of Section 606 of the Banking Law.'"

intendent is authorized to pay if payment thereof is authorized under the State Banking Law.

By the foregoing provisions of the Vesting Order, and by corresponding provisions of his letter of September 28, 1942, the Custodian recognized the right of the State of New York to protect those American creditors of the Bank whose claims arose out of business carried on in New York through its New York Agency, and, in effect, upon its credit. As noted in the Custodian's Report of June 30, 1946, at page 89, referring to the liquidation of the New York branch of the Yokohama Specie Bank: "state banking laws favor certain creditors, who must be satisfied before a determination can be made of the amount of excess assets to be turned over to the Custodian."* By the course which he thus followed, the Custodian avoided a collision between state and national authority.

Vesting Order No. 915 constitutes the Custodian's final direction respecting the liquidation of the Bank's New York business and assets by the Superintendent and the payment of claims entitled to payment under the Banking Law. No relevant action, we believe, was taken by the Treasury after its renunciatory letter of October 29, 1942.

STATUTES AND EXECUTIVE ORDERS INVOLVED.

Foreign funds control was adopted and administered pursuant to authority granted, and subject to limitations contained in Section 5(b) of the Trading with the Enemy

*See the Annual Reports of the Custodian dated June 30, 1944, page 58, and June 30, 1945, pages 86 and 87, for further statements respecting the liquidation of the Yokohama Specie Bank by the Superintendent and the Custodian's policy respecting such liquidations.

Act of October 6, 1917 (40 Stat. 411), as amended. In 1941, at the time when the transactions constituting your petitioner's claim were taking place, the form and provisions of said Section 5(b) were those enacted in the Joint Resolution of May 7, 1940 (54 Stat. 179), a copy of which is appended to the brief submitted herewith (*Appendix A*). Section 5(b) was further amended, and the powers of the President were very substantially enlarged by the First War Powers Act, enacted December 18, 1941 (55 Stat. 838); a copy of the relevant provisions thereof is annexed to the brief as *Appendix B*.

The Joint Resolution of May 7, 1940, approved Executive Order No. 8389 in the form in which it was originally promulgated by the President on April 10, 1940 (5 Federal Register* 1400). The Order underwent frequent and substantial revision, the most important of which took place on June 14, 1941 (6 F.R. 2897), following the President's declaration of an unlimited national emergency on May 27, 1941 (55 Stat. 647). After said June 14, 1941, revisions of Executive Order No. 8389 were not substantial. Copy of Section 1 of said Order, as of that date, is annexed to the brief as *Appendix C*.

The office of Alien Property Custodian was created and the jurisdiction, powers and duties of the Custodian were established on March 11, 1942, by Executive Order No. 9095 (7 F. R. 1971), which Order was supplanted, on July 6, 1942, by Executive Order No. 9193 (7 F. R. 5205).

The authority of the Superintendent of Banks of New York to liquidate the New York business and property of foreign banks and the provision respecting claims payable

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*Hereinafter cited: "F.R."

by the Superintendent in such liquidation is contained in Section 606, subdivision 4 of the New York Banking Law. As stated above the section was amended in 1946; said amendment is not retroactive (L. 1946, c. 65). A copy of Section 606, subdivision 4, as it stood prior to said amendment, is annexed to the brief as *Appendix D*.

Copies of the opinions of the Courts of Appeals upon the first (293 N. Y. 542) and second (299 N. Y. 113) appeals, and of said Court in *Banque Mellie Iran* v. *Yokohama Specie Bank* (299 N. Y. 139), a companion case, are annexed to the brief as *Appendices E, F and G*, respectively. Following the rendering of the Court's opinion and decision on the second appeal both parties moved to amend the Court's remittitur. The motions were granted, in part. The Court's memorandum on the motions is published, 299 N. Y. 791, and a copy thereof is annexed to the brief as *Appendix H*.

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257. The judgment of the New York Court of Appeals was entered on April 14, 1949 (R. 530-9). Judgment upon remittitur from said Court was entered in the New York Supreme Court, New York County, on November 25, 1949. On May 25, 1949, the Superintendent moved in the Court of Appeals for an order amending the remittitur from said Court to the State Supreme Court, and on May 27, 1949, plaintiff moved in said Court for similar relief, which motions were granted, in part, by order of said Court on July 19, 1949. On July 8, 1949, the Superintendent moved in the Court of Appeals for a reargument of the appeal, and that motion was denied by said Court by order dated October 6, 1949 (R. 586).

THE QUESTIONS PRESENTED

First, whether a license from the Treasury of the United States to the Superintendent of Banks of New York, authorizing him to pay your petitioner's claim, was necessary in order to permit payment of such claim, or of any judgment thereon, after the Alien Property Custodian, by Supervisory Order No. 27 and by his letter to the Superintendent, dated September 28, 1942, assumed supervision over the liquidation by the Superintendent, of the business and property in New York of The Yokohama Specie Bank, Ltd., and the Treasury, by its letter dated October 29, 1942, authorized the Superintendent of Banks, so far as Executive Order No. 8389, as amended, was concerned, to engage thereafter in any transaction without a specific license of the Treasury Department by a person who was not a national of any blocked country, and after said Custodian, by Vesting Order No. 915, vested the excess proceeds of the business and property in New York of said Bank in the possession of the Superintendent remaining after the payment of claims of creditors accepted or established in accordance with the New York Banking Law, and the expenses of liquidation.

Second, whether any documents in the record, issued by the Secretary of the Treasury or by the Alien Property Custodian, and specifically, whether Treasury License No. N. Y. 338836-SU, dated January 14, 1942, or the letter of the Treasury dated October 29, 1942, or Supervisory Order No. 27 issued by the Alien Property Custodian, or the Custodian's letter to the Superintendent of Banks dated September 28, 1942, which refers to said Order, or the Custodian's Vesting Order No. 915, or all or any combina-

tion of said documents, license or authorize said Superintendent of Banks to pay your petitioner's claim.

Third, whether the Court of Appeals was correct in its determination and judgment that your petitioner is not entitled to interest upon his claim because, in view of Executive Order No. 8389, as amended, payment of said claim can not be made without a specific Treasury license, and the documents enumerated in the preceding proposed question do not constitute such a license or authorization.

The Superintendent, in his application to this Court for certiorari (No. 512; see pp. 2-3) contends that "The New York Court of Appeals held: (a) that the claim asserted by plaintiff rests upon a transaction prohibited by the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto * * *." We believe and shall argue that the Court did not so hold. In the event, however, that this Court shall agree with that construction by the Superintendent of the holding of the New York Court of Appeals, we wish to present the following additional question:

Fourth, whether the claim asserted by your petitioner rests upon a transaction prohibited (unless licensed) by the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto.

That question is essentially involved in, and is substantially coextensive with the issues involved by the Superintendent's application for certiorari. To avoid unnecessary duplication of argument, we shall brief it in our memorandum to be submitted in connection with such application.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In holding that alien enemy business enterprises in the United States—as, The Yokohama Specie Bank—and their properties, over which the Alien Property Custodian had assumed jurisdiction, are subject to dual and overlapping control, by the Custodian and by the Treasury, the New York Court of Appeals decided an important question of federal law relative to the administration and liquidation of such enemy business enterprises and their properties within the United States by the Custodian. In holding that the documents issued by the Treasury and the Custodian and relied upon by your petitioner as licenses authorizing payment of his claim do not constitute such license and authorization, the Court of Appeals determined a second important question of federal law relating to the administration of enemy business enterprises and property in the United States and the liquidation of claims relating thereto.

The record on appeal establishes beyond question that the claim, payment of which is sought, arose out of bona fide transactions, entered upon long prior to the declaration of an unlimited national emergency or the extension of freezing control to Japan, and that such transactions did not involve foreign confiscation or duress and were not entered into for any hostile or subversive purpose, or for any purpose contrary to the interest or policy of the United States. As has been pointed out, the character and source of the underlying transactions in Japan have been stipulated by the Superintendent of Banks upon the strength of documents and information furnished him by the War Department.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals and the judgment entered thereon in the New York Supreme Court, New York County, in so far as they determine and adjudge that payment of your petitioner's claim and of such judgment cannot be made until a specific license authorizing such payment shall have been issued by the Treasury of the United States, and that your petitioner is not entitled to interest upon his claim by reason of the lack of such a license, be reversed; and that your petitioner be granted such other and further relief as may be just and proper.

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January 4, 1950.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals of the State of New York, rendered on April 14, 1949 (R. 530-539), is reported, 299 N. Y. 113. The memorandum of that Court upon motions to amend remittitur is reported, 299 N. Y. 791. The opinion of that Court in *Banque Mellie Iran v. Yokohama Specie Bank*, a companion case involving many of the same points, is reported, 299 N. Y. 139. The opinion of that Court in this (*Singer*) case upon a prior appeal (R. 525-529) is reported, 293 N. Y. 542. No opinion was rendered by the Appellate Division of the New York Supreme Court. The brief opinion rendered at trial term of that Court (R. 508) has not been published.

Argument

POINT I

A TREASURY LICENSE AUTHORIZING PAYMENT OF YOUR PETITIONER'S CLAIM CEASED TO BE NECESSARY WHEN THE ALIEN PROPERTY CUSTODIAN ASSUMED JURISDICTION OVER THE LIQUIDATION OF THE YOKOHAMA SPECIE BANK'S NEW YORK AGENCY, BUSINESS AND PROPERTY.

It was the special function of the Alien Property Custodian to exercise jurisdiction over alien enemy banking and other business enterprises, including the dollar balances and other assets of such enterprises; and also, over any property in process of administration by any person acting under judicial supervision which was payable or

deliverable to, or claimed by, a national of a designated enemy country (Executive Order No. 9193, section 2, paragraphs (a) and (f)). And after the creation of the office of Alien Property Custodian it continued to be the function of the Treasury to exercise jurisdiction over the dollar balances, bullion and securities of such nations and their nationals, except those which belonged to an enemy business. That division of jurisdiction and authority, as between the Custodian and the Treasury, was fixed and determined by the President not later than July 6, 1942, when he promulgated Executive Order No. 9193, amending Executive Order No. 9095. On that date the following statement, explanatory of the Executive Order*, was issued by the White House:

> "The President has signed an executive order allocating powers and functions between the Alien Property Custodian and the Secretary of the Treasury with respect to property of enemy, neutral, and occupied countries and their nationals.
>
> "The Executive Order provides for the following division:
>
> "1. The Alien Property Custodian will handle:
>
> "(a) *Enemy-owned or controlled businesses* (including dummies) operating in the United States *and the dollar balances and other assets of such businesses.*
>
> * * * * * * *
>
> "2. The Treasury will continue to handle:
>
> "(a) The dollar balances, bullion and securities of governments or nationals *except those*

*Press Release No. 37; Documents Pertaining to Foreign Funds Control, issued by the Treasury, September 15, 1946, page 74.

which belong to an enemy business. * * *" [Emphasis added.]

As stated, the jurisdictional basis of that scheme of administration and division of authority is Executive Order No. 9193. At the risk of stating the obvious, we would point out that the power granted the Custodian under it was not merely a second and duplicatory power to freeze property. On the contrary, it was primarily a "power to direct, manage, supervise, control * * *: Any business enterprise in the United States * * *" (including its property) if either enemy-owned*, or in certain cases if foreign-owned. If the Treasury had retained control over such enterprises or their properties, a conflict—certainly in its scope and at least potentially in its exercise—would have existed between that retained power and the Custodian's power of direction, management and control over them. That conflict the Order avoids. Section 2, after describing the areas in the field of foreign property control over which the Custodian is authorized to exercise jurisdiction, provides:

"When the Alien Property Custodian determines to exercise *any power* and authority conferred upon

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* "2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

"(a) Any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;"

> him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release *all control* of such property, except as authorized or directed by the Alien Property Custodian." [Emphasis added.]

Pursuant to the foregoing grant of power the Custodian, on September 28, 1942, issued his Supervisory Order No. 27, entitled: "Re: Yokohama Specie Bank, Ltd. [New York]", by which he assumed supervision of the "New York branch of said business enterprise", and of all property owned, controlled or held by it, or on its behalf. The Order was based upon the Custodian's finding: "That Yokohama Specie Bank, Ltd., which has an established branch at New York * * * is a business enterprise within the United States which is a national of a designated enemy country [Japan]", and that it or its New York branch has or claims property which is in process of administration by the Superintendent, acting under judicial supervision by the New York Supreme Court (R. 482-4).

By that Supervisory Order, it is clear, the Alien Property Custodian exercised the power expressly vested in him by Executive Order No. 9193, "to * * * supervise * * *: Any business enterprise within the United States [the New York branch of the Bank] which is a national of a designated enemy country and any property * * * owned or controlled by * * * such business enterprise * * *." Upon issuance of that Order, and upon due notification thereof, it became the duty of the Treasury to "release *all* control of such property * * *."

Accordingly, on October 29, 1942, by letter, the Treasury advised the Superintendent that in view of the issuance

of the Supervisory Order, so far as Executive Order No. 8389 was concerned, he might thereafter engage in any transaction which might be engaged in without a license by a person who was not a national of a blocked country; suggested that the Superintendent communicate with the Custodian concerning the applicability to "your enterprise" of any orders, regulations or rulings by the Custodian; and revoked its license, under which the Superintendent had been carrying on the liquidation (R. 380). The United States, in its brief to the New York Court of Appeals in support of the Superintendent's application for leave to appeal to that Court, said (p. 17) that this letter "thus constituted the *release* called for by Section 2 of Executive Order No. 9193." And in its brief, as *amicus curiae*, to the Appellate Division of the New York Supreme Court, the United States described the letter (p. 26) as "a device for the *withdrawal* of the Treasury from the field on the occasion of the assumption of jurisdiction by the Alien Property Custodian."

The scheme of administration of enemy property thus established is perfectly clear. Two administrative authorities—the Treasury and the Alien Property Custodian—were designated and empowered to act. To each was given jurisdiction over certain blocked enterprises and properties and the claims pertaining to them. No duplication of authority, or of jurisdiction, was contemplated. No reason appears, or has been suggested, why there should have been such duplication; why, for example, the Treasury should have retained veto powers over the Custodian's decisions, or why separate, concurring, affirmative action by both the Treasury and the Custodian should have been necessary upon all claims.

Nor is there any doubt that the Custodian asserted and exercised authority to pass upon all claims affecting enemy business enterprises and their property, over which he had assumed jurisdiction or, specifically, that he did so in this liquidation. As the Court of Appeals pointed out, the Custodian, by his letter accompanying Supervisory Order No. 27, required the Superintendent of Banks to submit to him, in advance, all claims which the Superintendent intended to accept. And as pointed out by the United States in its brief (p. 17) as *amicus curiae* to the Court of Appeals in support of the Superintendent's application for leave to appeal to that Court: "immediately upon the receipt of the [Treasury] release, the Custodian explicitly prohibited 'All transactions * * * by, or with, or on behalf of, or pursuant to the direction of, any business enterprise' of which he had undertaken supervision except as specifically authorized by the Custodian or his representatives," citing the Custodian's certificate of appointment of supervisors (7 F. R. 8910) and his General Order No. 31 (9 F. R. 7739). Such controls are substantially identical with controls imposed by the Treasury under Executive Order No. 8389. Thus, the Custodian's General Order No. 31 forbade, unless licensed by him or his subordinates, any transactions which involved any property, control of which had been released to him by the Treasury, or which were by, or with, or on behalf of, or pursuant to the direction of any business enterprise of which he had undertaken supervision or of a business any of the assets of which he had vested.*

*The order forbade, unless so licensed:

"(1) All transactions involving any property, control of which has been released by the Secretary of the Treas-

No declaration, decision (other than the decision in this case), or pronouncement, either executive, administrative or judicial, can be cited in support of the contention that enemy business enterprises over which the Custodian had assumed jurisdiction, or that the property of such enterprises, were subject to dual control, by the Custodian and by the Treasury. All available source material and authority substantiates the opposite view. Thus the Custodian, in his Annual Report for the Period March 11, 1942, to June 30, 1943, states (page 9) that: "In the case of property already subject to 'freezing control' of the Secretary of the Treasury, provision was made for the release of control to the Custodian upon his determination to assume jurisdiction." Statements of like tenor appear in the Custodian's Reports for the Fiscal Years ended June 30, 1944 (at pp. 2-3), and June 30, 1945 (at p. 4). Similarly the Treasury, in General Ruling 19 (11 F.R. 8350), declared that it had released to the Custodian: "all control under Executive Order No. 8389 * * * and Executive Order No. 9193 * * * of any property or interest of Germany or Japan or any national thereof vested by the Alien Property Custodian * * *", that such release constituted a "final

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ury pursuant to Executive Order No. 9095, as amended, subject to the power and authority conferred upon the Alien Property Custodian; and

"(2) All transactions by, or with, or on behalf of, or pursuant to the direction of, any business enterprise of which the Alien Property Custodian has undertaken the supervision, or which he has vested, or assets of or interests in which he has vested, or involving any property in which such business enterprise has any interest, control of such property or business enterprise having been released by the Secretary of the Treasury pursuant to Executive Order No. 9095, as amended."

denial" of any application for a license then pending before the Treasury respecting such property so vested, and that: "No application for license or other authorization with respect to any such property or interest will thereafter be entertained or granted by the Secretary of the Treasury."

It is apparent that at no time after the Custodian issued his Supervisory Order was it within the power, the discretion or the policy of the Treasury to issue any license authorizing the payment of this claim, or the effect of which would have been to have transferred to Standard, or to your petitioner, any interest in the property, formerly of the Bank, which was held by the Superintendent as liquidator. And it is equally apparent that at no such time did there rest upon your petitioner, or upon the Superintendent, any legal requirement to obtain a license from the Treasury in order to permit payment of the claim or judgment to be made. The decision of the Court of Appeals to the contrary is clearly error.

POINT II

THE DOCUMENTS ISSUED BY THE TREASURY AND BY THE ALIEN PROPERTY CUSTODIAN TO THE SUPERINTENDENT, AS LIQUIDATOR, AUTHORIZE THE PAYMENT OF YOUR PETITIONER'S CLAIM.

As has been pointed out in the annexed petition, the Treasury issued to the Superintendent three licenses: a preliminary license on December 19, 1941; a general liquidating license on January 14, 1942; and a supplementary license on February 9, 1942. The first and third have no bearing upon the payment of claims of the character of the one in suit. The second (the license of January 14, 1942) was canceled by the Treasury by its letter of October 29, 1942. Payment of this claim, therefore, is not now author-

ized by any of those documents, and they will not be briefed in this Point.

Your petitioner believes, and will here argue, that payment of his claim and judgment, without any specific license, is authorized by the documents issued to the Superintendent by the Alien Property Custodian. The argument will rest upon the two propositions which follow:

First, the Treasury's letter of October 29, 1942, was a release of all control over the Superintendent as liquidator of the Bank's former business and property—the proposition briefed in Point I. Even if the letter be regarded as a license to the Superintendent, its provisions are broad enough to authorize payment of your petitioner's claim and judgment.

Second, the documents issued to the Superintendent by the Alien Property Custodian clearly authorize payment of the claim, as an act required of the Superintendent as liquidator by the State Banking Law.

A.

The Treasury's Letter of October 29, 1942, either Released the Superintendent as Liquidator from all Control by the Treasury under Executive Order No. 8389 or Expressly Authorized Payment of Petitioner's Claim.

We believe it to be clear, for reasons stated in Point I, that the intent and the effect of the Treasury's letter, when read in conjunction with the Alien Property Custodian's Supervisory Order No. 27, was to release to the Custodian all control over the liquidation.

Payment of your petitioner's claim clearly is within the scope of authority which the letter—if regarded as a license—confers upon the Superintendent. It authorizes him (R. 380):

> "* * * so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction on or after October 29, 1942, which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country."

Payment by the Superintendent—an American state official holding title under federal license to funds formerly belonging to a Japanese bank—of a claim held valid and preferred under the New York Banking Law by a New York court, to an American claimant, clearly is a transaction which might be engaged in without a Treasury license. It falls squarely within the authorizing language of the letter.

The Court of Appeals, holding to the contrary, said that the situation of the Agency (actually of the Superintendent, since the Agency was closed and in liquidation) was like that of a domestic bank, attempting to make payment upon instructions from the Yokohama Bank. It said, also, that in making such a payment, the Superintendent would be carrying out the nine-year-old banking transaction out of which the claim arose (299 N. Y., at pp. 123-4). Both statements are clearly erroneous. The Agency cannot act; it is closed. The Superintendent is not a bank but a liquidator. His acts are not banking transactions but acts of liquidation. All federal licenses or authorizations issued to him were issued to permit liquidation. Payment of this claim will be such an act; it will be the payment of a *claim*. Such payment will be made because the provisions of the State Banking Law and the judgment of the State courts require that the claim be paid by the Superintendent as liquidator. Thus, payment will be at the direction of the statute and the judgment; the Superintendent is without

power under either the statute or the judgment to make any payment at the direction of a foreign bank. The judgment, as amended, expressly provides that plaintiff is entitled to payment as a holder of a claim entitled to preference in the liquidation (299 N. Y., 791); it does not provide for payment at the direction of the Japanese Bank. Under the terms of the Banking Law instructions by a foreign bank, standing alone, would not even support a claim entitled to payment in the liquidation.* As has been stated, the Superintendent—unlike the local bank which the Court premised—holds title under federal license to the funds and credits, formerly of the Japanese Bank, to be drawn against in making the payment; if he cannot pay this claim because (as would be the case of the American bank) the funds and credits from which payment is to be made are frozen, then he cannot pay and should not have paid any claim for the same reason.

All the foregoing facts, we submit, illustrate the error involved in the decision of the Court of Appeals upon this point. If this letter is to be regarded as other than a release of jurisdiction, then clearly it must be regarded as a grant to the Superintendent of authority to perform those acts which the licenses contemplated and the Banking Law required of him and which this letter clearly contemplates—acts of liquidation. Payment of this claim will be such an act.

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*Section 606(4) of the New York Banking Law directs that "*Claims* of creditors of such corporation arising out of transactions had by them with its New York agency" shall be paid in the liquidation, and that when such claims, together with interest and the costs of the liquidation have been paid in full, the balance remaining shall be turned over to the bank's home jurisdiction

B

The Documents Issued to the Superintendent by the Alien Property Custodian Authorize Payment of this Claim as an Act Required of the Superintendent as Liquidator under the State Banking Law.

The question whether, at the present time, payment of the claim and judgment is authorized by the federal authorities, turns upon the meaning of the documents issued by the Alien Property Custodian. Those documents explicitly authorize the Superintendent, as liquidator, to perform all acts which the New York Banking Law requires of him. They contain no relevant provision limiting the Superintendent's authority to perform such acts. They expressly recognize that the payment of claims against the Bank which arise out of transactions with its New York Agency are entitled to preference and payment in the liquidation. The judgments of the State courts establish that this is such a claim within the meaning of the Banking Law.

The Alien Property Custodian's letter of September 28, 1942, to the Superintendent, which accompanied his Supervisory Order, describes the nature and extent of the authority granted as follows (R. 378):

> "For the present, it is contemplated that you shall continue to retain possession of and liquidate such business enterprise, its property and assets, and in the course thereof you may do such acts and perform such duties as may be required of or permitted to you by and in accordance with and subject to the provisions of the Banking Law of the State of New York. * * *"

Likewise, the Custodian's Vesting Order granted to the Superintendent authority (R. 487):

> "* * * to continue to retain possession of, collect and liquidate such business, property and assets and,

> in the course thereof, to do such acts and perform such duties (not inconsistent herewith) as may be required or permitted to said Superintendent of Banks by and in accordance with and subject to the provisions of the Banking Law of the State of New York; * * *"

Both documents recognize that the payment of claims entitled to preference under the Banking Law is an act required of the Superintendent under that law, and both contemplate that he will pay those claims.

The letter of September 28, 1942, said (R. 379):

> "You are also requested to notify the undersigned when * * * there have been paid, all the accepted or established claims of creditors whose claims arose out of transactions had by them with the New York branch of such business enterprise, or whose names appear as creditors on the books of such branch, together with interest thereon * * *."

The Vesting Order said that property of the Agency (R. 486):

> "* * * remaining after the payment of the claims of the creditors, accepted or established in accordance with the Banking Law of the State of New York, arising out of transactions had by them with the New York agencies of said The Yokohama Specie Bank, Ltd. or whose names appear as creditors on the books of such agency, together with interest on such claims and the expenses of liquidation,"

was Japanese property, and was vested.

As has been pointed out, the plaintiff's claim has been unanimously adjudged to be a claim of that character by the New York courts.

In view of the clear grant, in those documents, of power to pay all such claims, and of the absence therefrom of any restrictive provision bearing upon this claim, we submit that payment of this claim has been and is authorized.

POINT III

THE DETERMINATION OF THE COURT OF APPEALS THAT YOUR PETITIONER IS NOT ENTITLED TO INTEREST BECAUSE HIS CLAIM CANNOT BE PAID WITHOUT A SPECIFIC TREASURY LICENSE IS ERRONEOUS.

The Court of Appeals denied your petitioner's right to interest solely because: "since payment has not yet been licensed, plaintiff is not entitled * * * to the accrual of interest thereon." The question of the right to payment has been briefed.

CONCLUSION

It is respectfully submitted that the issues raised by your petitioner involve important questions of federal law relating to the administration and disposition of frozen property and business enterprises formerly belonging to enemy nationals, that they call for the exercise of the supervisory powers of this Court, and that the petition of your petitioner for certiorari should be allowed.

Respectfully submitted,

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January 4, 1950.

APPENDIX A

Joint Resolution of May 7, 1940: 54 Stat. 179

JOINT RESOLUTION

To amend section 5 (b) of the Act of October 6, 1917, as amended, and for other purposes.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

" 'During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership or property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed.'

"SEC. 2. Executive Order Numbered 8389 of April 10, 1940; and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

"SEC. 3. Nothing in this Joint Resolution shall be deemed to repeal or to modify in any manner any of the provisions of the Act of April 13, 1934, 48 Stat. 574 (the Johnson Act) or of the Neutrality Act of 1939 (Public Resolution Numbered 54, Seventy-sixth Congress).

"Approved, May 7, 1940."

APPENDIX B

Provisions from First War Powers Act, 55 Stat. 838, 839 *et seq.*, Amending Section 5(b) of the Trading with the Enemy Act

"TITLE III—TRADING WITH THE ENEMY

"SEC. 301. The first sentence of subdivision (b) of section 5 of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"'(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"'(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

"'(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.*

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall

*The powers enumerated in division A of paragraph (1) are those contained in the Joint Resolution of May 7, 1940. The powers enumerated in paragraph B thereof are new.

vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * * * * * *

"SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed."

APPENDIX C

EXECUTIVE ORDER No. 8389, SECTION 1, APRIL 10, 1940, 5 F. R. 1400, AS AMENDED BY EXECUTIVE ORDER No. 8832, JUNE 26, 1941, 6 F. R. 3715:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, FRANKLIN D. ROOSEVELT, PRESIDENT of the UNITED STATES OF AMERICA, do prescribe the following:

Executive Order No. 8389 of April 10, 1940, as amended, is amended to read as follows:

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * * * *

APPENDIX D

New York Banking Law, Section 606(4).

4. (a) The superintendent may also forthwith take possession of the business and property in this state of any foreign banking corporation, which has been licensed by him under the provisions of this chapter, upon his finding that any of the reasons enumerated in subdivision one of this section exist with respect to such foreign banking corporation or that it is in liquidation at its domicile or elsewhere. After taking possession thereof the superintendent shall liquidate the business and property of any such foreign banking corporation in accordance with the provisions of this chapter applicable to the liquidation of banking organizations; provided, however, that the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies or whose names appear as creditors on the books of such agency or agencies shall be preferred against the assets of such corporation in this state without prejudice to their right to share in the other assets of such corporation.

(b) Whenever the claims of such creditors, together with interest thereon, and the expenses of the liquidation have been paid in full, the superintendent upon the order of the supreme court shall turn over the remaining assets to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator or receiver of said foreign banking corporation.

APPENDIX E

EUGENE T. SINGER, Appellant, *v.* THE YOKOHAMA SPECIE BANK, LIMITED, Defendant, and ELLIOTT V. BELL, as Superintendent of Banks of the State of New York, Respondent.

Argued October 20, 1944; decided November 30, 1944, 293 N. Y. 542.

LEWIS, J. The Yokohama Specie Bank, Ltd., to which it will be convenient to refer as "Yokohama Specie", is a banking corporation incorporated under the laws of the Empire of Japan and was formerly licensed by the respondent Superintendent of Banks to transact a limited banking business in the State of New York. Under that license Yokohama Specie was permitted to maintain in this State an agency for the transaction of such a banking business. On December 8, 1941, after a state of war had been declared to exist between the United States and Japan, the Superintendent of Banks, acting pursuant to section 606 of the Banking Law, took possession for the purpose of liquidation of the business, property and affairs of Yokohama Specie within the State of New York and suspended the operation of its New York Agency. While such liquidation was in process the plaintiff asserted his right as a creditor of the New York Agency under an assignment from Standard Vacuum Oil Company—to which reference will be made as "Standard"—and filed with the Superintendent of Banks on November 21, 1942, a claim for $557,561.25 against funds of the New York Agency in the possession of the Superintendent. That claim, based upon facts which are not here in dispute and are presently to be considered, was rejected by the Superintendent of Banks upon the ground that applicable law afforded no basis for its payment.

As a means to enforce his claim, the plaintiff instituted the present suit, wherein, upon motion by the defendant at Special Term, the action was severed to permit its con-

tinuance against Yokohama Specie and the complaint was dismissed against the Superintendent of Banks. The Appellate Division has granted to the plaintiff leave to appeal from its order unanimously affirming the judgment entered at Special Term and has certified that a question of law is involved which should be reviewed by this court. That question of law arises from the following facts:

On August 27, 1941, Standard, through its Yokohama office delivered to Yokohama Specie in Japan the yen equivalent to $557,561.25 with instructions to pay that dollar amount to Standard in New York. Two days later, on August 29, 1941, the assistant-treasurer of Standard in New York was advised by telephone by the cashier of the New York Agency of Yokohama Specie that the New York Agency had received from Yokohama Specie the telegraphic transfer of $557,561.25 which amount was available for payment to Standard. In response to this advice the assistant-treasurer of Standard stated to the cashier of the New York Agency that Standard was making the necessary application to the United States Treasury Department for a license which would permit the payment by the New York Agency to Standard. On September 2, 1941, Standard received at its New York office the following confirmatory letter:

"THE YOKOHAMA SPECIE BANK, LIMITED
NEW YORK AGENCY
EQUITABLE BUILDING

New York, August 29th, 1941.

STANDARD VACUUM OIL COMPANY
10 Broadway
New York City
New York.

GENTLEMEN: Att. Mr. Mitbo:

Referring to our telephone conversation of today, we wish to advise you that we have received telegraphic instruc

tions from our Yokohama Office to pay you the sum of $557,561.25.

We understand that you are filing an application with The Treasury Department of the U. S. A. for a License in order to permit us to make this payment to you.

Awaiting your reply regarding this matter, we remain

Yours very truly,

THE YOKOHAMA SPECIE BANK, LTD.

(signature illegible)
p. p. Agent"

During the preparation by Standard of the application to the Treasury Department a representative of Standard was advised by telephone by a representative of the New York Agency that the payment would be made to Standard from funds of the New York Agency on deposit with Guaranty Trust Company of New York.

Before any payment was made by the New York Agency to Standard there occurred the attack by Japan at Pearl Harbor. Then followed the declaration of war and promptly thereafter the Superintendent of Banks took possession of the funds of the New York Agency and proceeded to liquidate the same pursuant to section 606 of the Banking Law. That statute, after specifying grounds upon which the Superintendent may take possession of the business and property in this State of a foreign banking corporation, provides in part: "4 (a) * * * *the claims of creditors of such corporation arising out of transactions had by them with its New York agency* or agencies or whose names appear as creditors on the books of such agency or agencies shall be preferred against the assets of such corporation in this state without prejudice to their right to share in the other assets of such corporation." (Italics supplied.)

Our problem is concerned chiefly with the interpretation and application of the italicized portion of the statute quoted above.

The plaintiff concedes that neither his name nor the name of his assignor, Standard, appears as a creditor on the books of the New York Agency of Yokohama Specie. However, the plaintiff asserts that, within the provisions of section 606, subdivision 4, paragraph (a), its assignor, Standard, had a *transaction* with the New York Agency the details of which, when considered together, were sufficient in law to qualify for payment the claim in suit.

The Superintendent of Banks has thus far successfully maintained that the deposit by Standard with Yokohama Specie in Japan and the subsequent telegraphic instructions by Yokohama Specie to its New York Agency, followed by the communications, mentioned above, from that Agency to Standard in New York, did not create enforcible rights in favor of Standard arising out of a *transaction* by Standard with such Agency within the terms of section 606, subdivision 4, paragraph (a) of the Banking Law.

Prior to December 8, 1941, the date when the declaration of war caused the Superintendent of Banks to take possession of the business and property of Yokohama Specie in New York, the Superintendent had issued to that foreign corporation a statutory license under which it was permitted "* * * to maintain an agency [in the City of New York] for the purpose of transacting the business of * * * receiving money for transmission or transmitting the same by * * * cable or otherwise * * *". When on August 27, 1941, Yokohama Specie at its home office in Japan accepted funds from Standard it thereby became indebted to Standard in the amount then deposited. When on August 29, 1941, following instructions from Standard and acting under its New York license, Yokohama Specie transmitted those funds by cable from Japan to its New York Agency, we think the consequent oral and written communications, to which reference has been made—by which the New York

Agency advised Standard that it was in funds from its Yokohama home office which it was instructed to pay to Standard—served to create an enforcible legal obligation by the New York Agency to make such payment. (See *Sayer* v. *Wynkoop*, 248 N. Y. 54, 58-60; *Goodwin* v. *Bowden*, 54 Me. 424, 425; *Griffin* v. *Weatherby* [1868] L. R. 3 Q. B. 753, 758-9; 2 Williston on Contracts [Rev. ed.], § 349, p. 1035; Mechem on Agency [2d ed.], p. 1072; Tiffany on Agency [2d ed.], p. 355.

The fact that Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389, as amended, is procured does not make conditional the obligation of the New York Agency to pay. (See United States Treasury Department, General Ruling No. 12 (4) under Executive Order No. 8389 as amended; also *Feuchtwanger* v. *Central Hanover Bank*, 288 N. Y. 342.)

Our conclusion is that the course of dealing which culminated in the advice to Standard by Yokohama Specie's New York Agency, given in accord with instructions from its home office in Japan, was a *transaction* had by a creditor (Standard) of a foreign corporation (Yokohama Specie) "with its New York agency," within the provisions of section 606, subdivision 4, paragraph (a) of the Banking Law. Any payment of funds by Yokohama Specie's New York Agency to Standard as an incident of such transaction is subject to the provisions of Executive Order No. 8389, as amended.

The judgments should be reversed and the motion by the Superintendent of Banks denied, with costs in all courts.

LEHMAN, Ch. J., LOUGHRAN, RIPPEY, CONWAY, DESMOND and THACHER, JJ., concur.

Judgments reversed, etc.

APPENDIX F

EUGENE T. SINGER, Appellant and Respondent, *v.* YOKOHAMA SPECIE BANK, LTD., Defendant, and ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of YOKOHAMA SPECIE BANK, LTD., Respondent and Appellant.

Argued January 11, 1949; decided April 14, 1949, 299 N. Y. 113.

FULD, J. This case and its companion, *Banque Mellie Iran* v. *Yokohama Specie Bank*, (299 N. Y. 139) which we also decide today, arise out of the liquidation by the State Superintendent of Banks, of the New York Agency of Yokohama Specie Bank, Ltd., a Japanese national bank (hereinafter referred to as the New York Agency or as the Agency).

By the judgment before us, the Superintendent, as liquidator, is ordered to pay the principal of plaintiff's preferred claim against the New York Agency, together with interest from October 29, 1942. It is our conclusion that such payment has not been authorized in the manner required by applicable Federal freezing controls, and that the judgment appealed from must, consequently, be reversed.

The transaction here engaging our attention falls within the ambit of Federal orders and regulations which became effective in July, 1941, a month before the acts underlying plaintiff's claim were performed in Japan (Executive Order No. 8832; Code of Fed. Reg., Cum. Supp., tit. 3, p. 969 [1941]). By that executive order, existing controls on the domestically-situated assets and property of nationals of certain foreign countries were extended to include the nationals of Japan. In general, the controls prevented any dealings in assets in blocked accounts unless licensed by the United States Treasury Department (Executive Order No. 8389; Code of Fed. Reg., Cum. Supp., tit. 3, p. 645 [1940]). Judicial as well as voluntary transfers were interdicted if

such authorization was not obtained (U. S. Treasury General Ruling No. 12; Code of Fed. Reg., Cum. Supp., tit. 31, p. 8849 [1942]).

A survey of the underlying facts leaves no doubt that plaintiff's claim rests upon a transaction which was subject to the licensing requirements. In point of fact, we so ruled in 1944, when this litigation was before us in an earlier phase—on appeal from an order granting defendant's motion for summary judgment. (*See Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 550.) Our detailed narrative on that occasion, we but briefly review here.

Plaintiff sought to establish his status as a preferred creditor of the New York Agency as a result of a transfer of funds, by forward foreign exchange contracts, to his assignor, the Standard Vacuum Oil Company (hereinafter called Standard). The underlying dealings reached their culmination on August 29, 1941, when the Yokohama office of Standard delivered to the Yokohama Specie Bank in Japan the yen equivalent of $557,561.25, with instructions to pay that amount to Standard in New York. The bank cabled necessary orders to its New York Agency and the Agency straightaway advised Standard by telephone and letter that it was in receipt of payment instructions and that funds were available. The letter concluded with the statement that "We understand that you [Standard] are filing an application with The Treasury Department of the U. S. A. for a License in order to permit us to make this payment to you."

Without delay, Standard applied for a license and in December, 1941, renewed the application. Both requests were, as presently will appear, categorically denied by the Federal authorities early in 1942.

In the meantime, the Japanese struck at Pearl Harbor, and on the day following, December 8, 1941, simultaneous with our declaration of war, the State Superintendent of Banks took possession of the New York Agency and its funds, for purposes of liquidation in accordance with the

provisions of the Banking Law. Some months later—on November 21, 1942—plaintiff, as Standard's assignee, filed with the Superintendent a claim for $557,561.25 against funds of the New York Agency in the Superintendent's possession. After the Superintendent had rejected the claim upon the ground that applicable law did not authorize its recognition, plaintiff brought suit in August, 1943, for an adjudication that his claim was one "arising out of a transaction" with the New York Agency and entitled to preference under this State's Banking Law (§ 606, subd. 4).

The lower courts awarded summary judgment in defendant Superintendent's favor. It was their view that the New York Agency, never having promised to pay Standard, had never incurred binding liability, and, since that was so, they concluded that plaintiff's claim did not arise "out of a transaction" with the Agency within the meaning of the Banking Law provision.

On appeal, the Superintendent urged that this was the correct construction of State law; and, joined by the United States as *amicus curiæ*, also contended that Federal law, as embodied in the freezing controls, barred judicial recognition of plaintiff's claim, for the reason that such recognition would effect a prohibited transfer of blocked assets. We reversed on the question of State law, holding that plaintiff would—if he proved his allegations—establish an "enforcible legal obligation by the New York Agency", entitled to preference under the Banking Law (293 N. Y., *supra*, at pp. 549-550). However, impressed with the arguments advanced by defendant and the Government based upon the effect of the freezing regulations, we were careful to provide that plaintiff's payment was to be conditional upon his obtaining a Treasury license. On that point, our opinion brooks no argument. We recognized, we said, that "Federal regulations governing transactions in foreign exchange prevent the payment to Standard until a license under Executive Order No. 8389 * * * is procured"; and we went on to say that "Any payment of

funds by Yokohama Specie's New York Agency to Standard as an incident of such transaction is subject to the provisions of Executive Order No. 8389, as amended" (293 N. Y., *supra*, at p. 550).

At that time, there were in the record before us certain documents, bearing both generally and specifically upon the question of Federal clearance of this transaction. Among them were two papers which are now relied upon by plaintiff as establishing Treasury approval. We certainly did not at the time accord those documents that effect, as the language quoted from our decision clearly demonstrates. Indeed, it is interesting to note that plaintiff himself did not so regard them, for he flatly declared that, if his claim were recognized as one entitled to a preference under State law, he would "thereafter" apply for the necessary Treasury clearance before he sought to enforce payment. Accordingly, when the Superintendent, on motion for reargument, maintained that our decision had flouted and violated Federal freezing controls, we could not agree. Reasoning that payment of plaintiff's claim remained conditional upon, and subject to, his "thereafter" procuring authorization in accordance with those regulations, we refused a rehearing (294 N. Y. 689).

The net effect of our decision was to deny the Superintendent's motion for summary judgment and to remit the matter for trial. That trial has now been held, and plaintiff's proof has satisfied both lower courts that the matters which we had earlier assumed to be true were true and that plaintiff has a claim entitled to recognition under the Banking Law. The record unquestionably sustains that finding.

In addition, the lower courts have now gone further and have held that plaintiff is entitled to immediate payment of his claim, with interest from October 29, 1942.

We believe that this conclusion is erroneous. If payment is to be ordered, it can only be done—and plaintiff acknowledges this—on the basis of proof that plaintiff's

claim has been licensed by Federal authorities; otherwise, the combined result of our decisions in this and the earlier *Singer* appeal (*supra*) would be to set at naught the Federal freezing controls program. We find no evidence of the necessary authorization. Not only is plaintiff unable to point to any treasury communication which is specifically addressed to his claim and authorizes its payment, but all the papers which relate in express terms to his claim explicitly withhold Treasury clearance. Nor, in our judgment, do the generally-worded documents upon which plaintiff relies license payment.

The first document to be considered is a communication, labeled a "License", dated January 14, 1942. Neither of the courts below found authorization in this letter, and, as already indicated, we agree with that conclusion. With the Superintendent of Banks in control of the branches of various foreign banks in New York State, including the New York Agency, the Federal Reserve Bank, on behalf of the Secretary of the Treasury, issued a general license, authorizing the Superintendent to make payment to depositors and to perform all other acts appropriate to orderly liquidation of the local assets of the Agency and nine other foreign banking corporations. The license expressly excluded from its scope transactions "involving a blocked national other than the bank in liquidation". Both the Yokohama office of Yokohama Specie Bank, Ltd., and Standard's branch office in Japan fell within that description: both were Japanese corporations and were, therefore, "blocked nationals." As a consequence, the transmittal of funds which they directed constituted a prohibited transfer and could be effected—we quote from the letter—"only as authorized by a general or specific license." Plaintiff, claiming under such a transfer, was not freed from the necessity of showing that consummation of the transfer was elsewhere authorized.

If there could be the least doubt that the January 14th license was not intended to clear plaintiff's claim, that doubt

is laid at rest by consideration of a few of the attendant circumstances. On the day before the license was issued—January 13, 1942—the Treasury Department specifically and in so many words denied the application for a clearance which Standard submitted on December 29, 1941. And, on the very same day that the letter was issued—January 14th—the Treasury again notified Standard that its request for payment was rejected, this time in explicit denial of Standard's first application for clearance, dated August 29, 1941.

As noted, the lower courts did not read the January 14th paper as authorizing payment of plaintiff's claim. They did, however, take the view that payment was permitted by a second letter sent by the Federal Reserve Bank to the "Yokohama Specie Bank, Ltd., New York Agency, c/o Supt. of Banks of the State of New York". That letter read in this way:

"Reference is made to Supervisory Order No. 27, executed on September 23, 1942, by the Alien Property Custodian.

"In view of such order, *you are authorized by the Treasury Department, so far as Executive Order No. 8389, as amended, is concerned, to engage in any transaction on or after October 29, 1942, which might be engaged in without a specific license of the Treasury Department by a person who is not a national of any blocked country.*

"License No. NY 338830-SU is hereby revoked insofar as it applied to Yokohama Specie Bank, Ltd., New York Agency.

"It is suggested that you communicate with the office of the Alien Property Custodian concerning the applicability to your enterprise of any orders, rulings or regulations of such office." (Emphasis supplied.)

In claiming that the italicized sentence constitutes the essential authorization, plaintiff has misconstrued the letter's purpose and has misread its language. At the very most, the communication authorized the Superintendent to engage in noncontrolled transactions that came into existence "on

or after October 29, 1942," not before that date. The letter is prospective; it looks to the future, not to the past. Indeed, it could not retroactively authorize past transactions, for General Ruling No. 5 of the Treasury Department (Code of Fed. Reg., Cum. Supp., tit. 31, p. 8845 [1942]) expressly provided that no license or other authorization issued by the Treasury should be deemed to authorize or validate any transaction effected prior to the issuance thereof, unless such license or other authorization specifically so provides. There is, of course, no suggestion that the October 29th letter came within the exception to the ban on retroactive licenses; it contains nothing which can be read as a specific exemption from the coverage of the quoted provision. It follows that the maximum effect of the October 29th letter was to license otherwise uncontrolled transactions which occurred thereafter.

Clearly, then, it constitutes no authorization, for payment may not be treated as "a transaction" separate and apart from the dealings which brought the claim into being. Payment is but "an incident" of the transaction (293 N. Y., *supra*, at p. 530). The "transaction", having occurred in 1941, was, of necessity, "engaged in" before October 29, 1942. It is of more than passing significance that the plaintiff had unsuccessfully applied for payment on two separate occasions in 1941; the circumstance that payment was again sought after October, 1942, could not, in any event, bring the matter within the coverage or the effect of that communication.

We go further, however. Even if we were to assume that payment could constitute a "transaction * * * after October 29, 1942," it is not of the type which is sanctioned by the Treasury letter. The Superintendent was thereby empowered to engage only in those transactions which might be carried on "without a specific license of the Treasury Department by a person who is not a national of any blocked country." Patently, payment of plaintiff's claim does not fall within that category. Since the transfer of

funds involved the foreign office of the Yokohama bank and Standard's Japanese office, both nationals of Japan, and was to be performed at the direction of the foreign bank, it was a prohibited transfer and not a "transaction * * * which might be engaged in without a specific license * * * by a person who is not a national of any blocked country."

This conclusion, it is evident, is required by the October 29th letter itself. The patent purpose of that communication was to place the New York Agency, with respect to transactions covered by the Executive Order, in the same position as any domestic bank. Let us assume, for instance, that the Yokohama bank in Japan had instructed, not its New York Agency but some domestic bank to pay out to Standard funds of the Japanese bank there deposited. In such a case, we unquestionably would have a "transaction to be performed at the direction" of an enemy national, the Yokohama bank, and refusal of a license would plainly have been dictated (General Ruling No. 12, *supra*). Since, obviously, the Agency was in no better position than a domestic bank, and since the transaction could not have been "performed" by a national of this country "without a specific license", it inevitably follows that payment could not be made by the Agency without such explicit authorization.

The effect of the October letter was but to advise the Superintendent that the Alien Property Custodian had taken control of enemy business enterprises and banks on behalf of the Federal Government and that thenceforward the Custodian would have primary responsibility for Federal supervision of the Agency. It did not eliminate plaintiff's need for clearance and that view, it may be repeated, was clearly reflected in our utterances on the prior appeal.

The other documents upon which plaintiff relies as authorizing his payment may be dismissed with but passing mention.

A supervisory order—issued on September 28, 1942, by the Alien Property Custodian—was merely a recital that,

"to the extent deemed necessary or advisable", the New York Agency was to be supervised in its dealings and payments by the Custodian. Nothing in the order intimated that it was intended to license or to authorize a transaction prohibited generally by the Executive Order. On the contrary, instead of relaxing restrictions, it made liquidation of the New York Agency subject to further regulatory authority. Only by doing violence to both the language of the order and the spirit of the Federal controls system and its regulations, could we conclude that the surrender of Treasury supervision to the Custodian was intended to defrost, at one stroke, all of the frozen accounts of enemy nationals.

Indeed, the Custodian made this plain by a letter of the same date, the next of the papers referred to by plaintiff. In essence, it instructed the Superintendent to continue liquidation of the New York Agency, subject to the additional controls outlined in the supervisory order. This was accomplished by requiring that there be submitted to the Custodian, in his discretion, any claims then before the Superintendent. Far from constituting blanket authority to the Superintendent to pay all and sundry claims pending, the letter was an affirmation that the Custodian would thereafter reserve a veto power, even as to those claims which the Superintendent himself recognized. It is upon this ground that the United States Government presses its further point, which we neither pass upon nor consider, that not only a Treasury license but an authorization from the Custodian as well is necessary before plaintiff's claim may be paid.

The final document to which plaintiff points is Vesting Order No. 915 of February 15, 1943. The Custodian, by that order, vested in the United States "The excess proceeds of the business and property in the State of New York of The Yokohama Specie Bank, Ltd.," with the explicit proviso that it did not affect the Superintendent's power to continue liquidation. Of course, this vesting order did not authorize the Superintendent to do anything new; it merely reaffirmed

his existing power, and that, we have seen, did not include authority to pay plaintiff's claim.

The conclusion which we thus reach—that payment of plaintiff's claim has not been licensed—is compelled, then, not only by the theory and rationale of our earlier decision in this matter, not only by the tenor of the orders and communications of the Treasury Department and of the Custodian, but also by the basic scheme and the ultimate objectives of the program carefully worked out by the Federal Government for the control of enemy alien and other foreign funds. The consistent design of that program is to prevent the fruits of prohibited transactions from being harvested until the underlying dealings are screened and found to be consonant with the national interests. The entire program, its purpose and its design, would be completely upset and nullified if we were to give to the documents before us the carte blanche licensing effect sought by plaintiff. Such a decision would place in the same category, on a par, all sorts of foreign exchange contracts emanating from blocked nations during the prehostilities period, and it would validate, willy-nilly and in gross, all such transfers, irrespective of how illegal may have been their source, regardless of how illicit may have been their purpose. Manifestly, the language of the papers before us cannot be read to produce such a result.

And, since payment has not yet been licensed, plaintiff is not entitled, either to the principal of the claim or to the accrual of interest thereon. (See, e.g., *Moscow Fire Ins. Co.* v. *Heckscher & Gottlieb*, 285 N. Y. 674, affg. 260 App. Div. 646, 650; *Donnelly* v. *City of Brooklyn*, 121 N. Y. 9, 19-20; *McCloskey* v. *Brown*, 271 App. Div. 772).

The judgments should be reversed, without costs, and the case remitted to the Trial Term for the entry of judgment in accordance with this opinion.

Loughran, Ch. J., Lewis, Conway, Desmond and Dye, JJ., concur.

APPENDIX C

BANQUE MELLIE IRAN, Appellant and Respondent, *v.* YOKOHAMA SPECIE BANK, LTD., et al., Defendants, and ELLIOTT V. BELL, Superintendent of Banks of the State of New York, as Liquidator of YOKOHAMA SPECIE BANK, LTD., Respondent and Appellant.

Argued January 11, 1949; decided April 14, 1949.
299 N. Y. 139.

FULD, J. Disposition of this appeal is controlled by our two decisions in *Singer v. Yokohama Specie Bank*, the one decided today (299 N. Y. 113), the other in 1944 (293 N. Y. 542).

The facts are undisputed. During the first half of 1941, plaintiff, the Central Bank of Iran, seeking to create credits in favor of certain exporters in Japan, ordered a New York City bank, the Irving Trust Company, to pay to the New York Agency of Yokohama Specie Bank, Ltd., various sums of money, totaling $117,162.27. These funds were transmitted by the Agency to Japanese branches of Yokohama Specie Bank, Ltd., and stood to the credit of plaintiff's Japanese shippers. The credits were to expire on a date fixed, with the proviso that the unused balances were to be returned to plaintiff.

The onset of freezing controls in July, 1941, found the original totals intact, except for a single withdrawal of $1,000 and, when the credits expired shortly thereafter, a balance of $116,162.27 remained for refund to plaintiff. On December 2, 1941, a few days before Pearl Harbor, the home office of the Yokohama Specie Bank, Ltd., notified its New York Agency of the amount of the unutilized credits and, except as to items totaling $3,956.97, directed it to refund that amount to plaintiff. Since compliance with those directions would have involved a transfer of funds which were subject to Federal freezing controls, the New York Agency, in advising the Irving Trust Company of its

instructions from the home office, declared that it would hold the funds pending receipt of a Federal Treasury license clearing payment. Before such a license was procured, war broke out and the Superintendent of Banks took over the assets of the New York Agency, as liquidator. In that capacity, he rejected plaintiff's claim as a preferred creditor of the New York Agency.

In the present action against Yokohama Specie Bank, Ltd., and the Superintendent, as its liquidator, plaintiff sues for $116,162.27, the alleged balance of the moneys originally remitted to Japan, with interest from December 2, 1941, the date of the letter by which the New York Agency advised that it was in funds belonging to plaintiff. The complaint contains three causes of action. The first seeks recovery of specified sums which total $112,461.27, and the third involves an item of $3,701; the second cause of action may be disregarded, since the amount therein sought is included in the first cause of action.

The court at Special Term, concluding that plaintiff's proof established "a preferred claim under Section 606, subdivision 4(a), of the Banking Law", awarded plaintiff partial summary judgment for $112,205.30—the amount in the first cause of action less an item of $255.97—with interest on that amount from December 2, 1941. It was explicitly adjudged, however, that payment of that claim was "subject to the provisions of Executive Order of the President of the United States No. 8389 as amended". As to the remaining causes of action and the balance of the money sued for, the court granted the Superintendent's cross motion for summary judgment. Both parties appealed to the Appellate Division, which modified the judgment by providing that interest should run from October 29, 1942, rather than from December 2, 1941, and now both parties appeal to us from that determination.

Our decision on the first *Sinzer* appeal (293 N. Y. 542, *supra*) dictated both the recognition of plaintiff's claim as a preferred one under the Banking Law and the direction

that its principal amount be paid on condition that a license authorizing such payment be obtained from the Federal Government. The amount of $112,205.30 awarded represented the aggregate of the sums which the New York Agency, in its letter of December 2, 1941, acknowledged were due to plaintiff upon its obtaining Treasury authorization. Underlying plaintiff's claim for that amount was a course of dealings which culminated in the advice by the Agency that it was in funds which it was obligated to pay to plaintiff. These dealings constituted, to use the language of our decision in the earlier *Singer* appeal (293 N. Y., *supra*, at p. 550), "a transaction had by a creditor", plaintiff Banque Mellie, "of a foreign corporation", Yokohama Specie Bank, Ltd., "'with its New York agency,'" and, *pro tanto*, entitled plaintiff to a preference under subdivision 4 of section 606 of the Banking Law.

The same cannot, however, be said of the remaining items, aggregating $3,956.97, which were not mentioned in the Agency's letter to Irving Trust Company. There is entirely lacking, as to those sums, the essential acknowledgment by the New York Agency that it was under any obligation to pay plaintiff. It follows that plaintiff's claim to those items does not "arise out of a transaction" with the Agency and is not entitled to recognition as a preferred claim.

Of course, even the amount to which plaintiff has established an accrued claim is not yet ripe for payment. Recognize plaintiff's claim we may, but its payment must await authorization by the Treasury Department in accordance with Executive Order No. 8389 (Code of Fed. Reg., Cum. Supp., tit. 3, p. 645). As we held in the *Singer* appeal (*supra*), none of the documents relied upon by plaintiff may be accorded that effect. The result is that, in this case, just as in the *Singer* case, plaintiff may not, until it produces the necessary Federal clearance, collect the principal of its claim.

From this conclusion it flows as an inevitable corollary that plaintiff's claim for interest must fail. In the absence

of Treasury authorization, the Superintendent was under no obligation, certainly under no absolute or unconditional obligation, to pay the principal of plaintiff's claim. A settled principle of law prohibits the running of interest upon such an obligation. Indeed, for more than half a century this court has viewed as self-evident the proposition that interest does not accumulate upon an obligation to pay unless it is unconditional. (See, e.g., *Moscow Fire Ins. Co.* v. *Heckscher & Gottlieb*, 285 N. Y. 674, affg. 260 App. Div. 646, 650; *Donnelly* v. *City of Brooklyn*, 121 N. Y. 9, 19-20; *McCloskey* v. *Brown*, 271 App. Div. 772). "It is obvious", we declared in 1890, "that if the duty to pay has not become absolute, the liability for interest does not arise". (*Donnelly* v. *City of Brooklyn*, *supra*, 121 N. Y. at p. 20.) That precisely describes the situation before us; for payment of plaintiff's claim has expressly been made conditional upon Treasury authorization, "subject to the provisions of Executive Order * * * No. 83[illegible]". That being so, liability for interest does not arise.

The judgments should be modified, by eliminating the provisions adjudging that plaintiff is entitled to interest upon his claim and, as so modified, affirmed, without costs.

LOUGHRAN, Ch. J., LEWIS, CONWAY, DESMOND and DYE, JJ., concur.

Judgment accordingly.

APPENDIX H

EUGENE T. SINGER, Appellant and Respondent, *v.* YOKOHAMA SPECIE BANK, LTD., Defendant, and ELLIOTT V. BELL, as Superintendent of Banks of the State of New York, as Liquidator of Yokohama Specie Bank, Ltd., Respondent and Appellant.

Submitted May 31, 1949; decided July 19, 1949, 299 N. Y. 791.

Motion by defendant Superintendent of Banks and cross motion by plaintiff to amend remittitur granted to the extent indicated, and, in other respects, denied. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: The Supreme Court is directed to enter a judgment adjudging that plaintiff recover of the defendant Elliott V. Bell, as Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of Yokohama Specie Bank, Ltd., the sum of $557,561.25, without interest, which sum shall constitute a preferred claim payable out of the assets of the Yokohama Specie Bank, Ltd., in the possession of the defendant, Elliott V. Bell, as Superintendent of Banks of the State of New York, as liquidator of the business and property in the State of New York of Yokohama Specie Bank, Ltd., the payment of which, however, is subject to the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto. A Federal question was presented and necessarily passed upon by this court, viz.: it was held that the provisions of Executive Order No. 8389, as amended, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate Federal license is obtained, and that the documents in evidence do not constitute such a license. [See 299 N. Y. 113.]